Supreme Court, U. S.
FILED
OCT 25 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * *

NO. 77-116

* * *

RICHARD RUSSELL,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

* * *

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

* * *

HENRY WADE
Criminal District Attorney
Dallas County, Texas

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

JOE B. DIBRELL
Assistant Attorney General
Chief, Enforcement Division

JOHN H. HAGLER
Assistant District Attorney
Dallas County Courthouse
Dallas, Texas 75202
(214) 749-8511

JOHN PIERCE GRIFFIN
Assistant Attorney General

P.O. Box 12548
Austin, Texas 78711
(512) 475-3281

Attorneys for Respondent

INDEX

	Page
Table of authorities	ii
Opinion below	1
Question presented	1
Statement of the case	2
Statement of the facts	2
ARGUMENT:	
The principles of double jeopardy and collateral estoppel do not apply to probation revocation proceedings	3
Conclusion	8
Certificate of Service	9

TABLE OF AUTHORITIES

Cases	Page
Bass v. State, 501 SW.2d 643 (1973)	3
Branch v. State, 465 S.W.2d 160 (1971)	3
Burns v. United States, 287 U.S. 216, 77 L.Ed. 266, 53 S.Ct. 154 (1932)	4
Price v. Georgia, 398 U.S. 823, 26 L.Ed.2d 300, 90 S.Ct. 1757 (1970)	7
Settles v. State, 403 S.W.2d 417 (1966)	3
Scamarado v. State, 517 S.W.2d 293 (1974)	4
United States v. Jenkins, 420 U.S. 358, 48 L.Ed.2d 250, 95 S.Ct. 1006 (1975)	6
Valdez v. State, 508 S.W.2d 842 (1973)	3

STATUTES

Vernon's Annotated Code of Criminal Procedure, Art. 42.12	4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * *

NO. 77-116

* * *

RICHARD RUSSELL,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

* * *

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

* * *

This brief in opposition to the petition for certiorari in this cause is respectfully submitted on behalf of the Respondent, The State of Texas.

OPINION BELOW

This case was affirmed in an opinion by the Court of Criminal Appeals on Petitioner's first Motion for Rehearing, and its decision is reported at: *Russell v. State*, 511 SW2d 770. The Court did not file an opinion in connection with the overruling of Petitioner's second Motion for Rehearing.

QUESTION PRESENTED

Did the Court of Criminal Appeals err in holding that a verdict of not guilty is not a bar to a probation revocation in which the same offense is alleged in the Motion to Revoke?

STATEMENT OF THE CASE

Petitioner entered a plea of guilty to the offense of defrauding with a worthless check over the value of $50.00 on February 19, 1975. Punishment was assessed at five years probated. Petitioner was then indicted by a Dallas County Grand Jury for the offense of theft during its July, 1975 term in Cause No. F75-12165-MP and subsequently a Motion to Revoke Probation was filed on October 30, 1975. By agreement, the Motion to Revoke Probation was heard simultaneously with Cause No. F75-12165-MP because both were based upon the same transaction. Trial was before the court upon a plea of not guilty in Cause No. F75-12165-MP. The court found Petitioner not guilty in Cause No. F75-12165-MP, ostensibly because the State failed to prove the venue allegation in the indictment. The court then took the Motion to Revoke Probation under advisement and on January 28, 1976 found that Petitioner had violated a condition of his probation, to-wit: commit no offense against the laws of this or any other state or the United States. Punishment was reduced by the court to three years.

Appeal was taken from the order revoking probation. The Court of Criminal Appeals affirmed the decision of the trial court in a per curiam opinion delivered on November 10, 1976. Petitioner, then filed for Motion for Rehearing which was denied in an opinion, *Russell v. State*, 551 SW2d 770. Petitioner's second Motion for Rehearing was denied without opinion.

STATEMENT OF THE FACTS

Briefly, Otis Dunlap purchased certain real property in Van Zandt County, Texas on September 20, 1975 and gave Petitioner a check for $250.00 as partial down payment. In their discussions prior to the sale, Petitioner told Dunlap that he owned the property and

did not disclose the fact that there were any legal impediments on the property. D. W. Campbell, a realtor who brokered the property with Petitioner, had earlier informed Petitioner that he could not attempt to sell it without disclosing the fact that Petitioner was only in the process of purchasing it. Dunlap later learned that Petitioner did not own the property and attempted to recover his money.

ARGUMENT

I.

THE PRINCIPLES OF DOUBLE JEOPARDY AND COLLATERAL ESTOPPEL DO NOT APPLY TO PROBATION REVOCATION PROCEEDINGS.

Petitioner contends that his probation was improperly revoked because he was found not guilty in a prior trial for the offense which was alleged in the Motion to Revoke Probation. He reasons that since his prior trial before the court for theft resulted in a verdict of not guilty, the principles of double jeopardy applied, and that offense could not be used as a basis for the revocation of his probation.

It has been repeatedly held by the Texas Court of Criminal Appeals that revocation of probation does not subject a defendant to being placed in jeopardy twice for the same crime. *Valdez v. State*, 508 SW2d 842; *Bass v. State*, 501 SW2d 643, certiorari denied 415 U.S. 977, 39 L.Ed.2d 873, 94 S.Ct. 1563; *Settles v. State*, 403 SW2d 417. This is so because the nature of the revocation proceeding is not a criminal trial. *Branch v. State*, 465 SW2d 160.

Probation is not a right but is granted as a matter of grace. When a defendant, subsequent to a finding of

guilt, is sentenced to a correctional institution, the imposition of this sentence may be suspended in the discretion of the fact-finder. The defendant is then granted freedom from incarceration as long as he abides by the conditions set forth by the jury or the trial judge. This period of grace can be terminated if in the discretion of the trial judge he finds that any of these conditions have not been met. Article 42.12, Vernon's Ann. Code of Crim. Proc.

Thus, when it is alleged that one of the conditions has been abrograted, the trial court may remove a defendant from that period of grace if he finds by only a preponderance of the evidence that one or more of these conditions were violated. *Scamarado v. State*, 517 SW2d 293. Indeed, probation may be revoked on the basis of conduct which falls short of criminal conduct. *Burns v. United States*, 287 U.S. 216, 77 L.Ed. 266, 53 S.Ct. 154.

Initially, since the question of proof in a probation revocation hearing is lower than that for the ordinary criminal prosecution, ipso facto, the provisions of the Double Jeopardy Clause do not apply. The verdict of not guilty in a criminal trial means that the allegations in the indictment were not proved beyond a reasonable doubt. A fact-finder could well have determined that a defendant had committed an offense by a preponderance of the evidence, but because they still entertained a reasonable doubt, they are legally bound to render a verdict of not guilty. Thus a verdict of not guilty beyond a reasonable doubt does not necessarily include a finding of not guilty by a preponderance of the evidence. Accordingly, the issue of whether Petitioner committed theft by a preponderance of the evidence was still viable at the close of his trial for theft and the

principle of collateral estoppel does not attend.[1]

Because the revocation hearing is not a "trial" and since it is a proceeding based on the underlying offense and not the offense to which jeopardy can be deemed to attach, the Double Jeopardy Clause is inapplicable. That clause dictates that no person shall be twice put in jeopardy *for the same offense.* In a probation revocation hearing, the basis for the potential loss of liberty is the offense for which a defendant was originally convicted and in which his sentence was suspended. If probation is revoked, the defendant must serve a term in the penitentiary not, as here, because it was found he

[1]It is worthy to note that in the instant case, a fair reading of the record indicates that the court never made a finding as to the criminal acts alleged in the indictment, but instead found that the State had not proved the venue allegation. The trial on the merits, i.e., the theft case, involved a legally intricate land fraud situation. Yet after both sides closed, the only argument put forth by defense counsel was that the State had failed to prove the venue allegation (S/F 85-88). Immediately, after hearing the State's argument on venue, the court declared:

> "There being nothing further, the Court finds that the State has not proven the indictment in Cause F-75-12165, by the legal and competent evidence beyond a reasonable doubt, and finds the Defendant to be not guilty in that case.
>
> Now, we will hear arguments in the probation revocation case.
>
> MR. COLVIN: I will waive.
>
> MR. WORTHY: I will waive argument.
>
> MR. COLVIN: We will waive argument, Your Honor, the Court has heard the evidence.
>
> THE COURT: The Court will take under consideration and advisement the facts and circumstances as they relate to the motion to revoke probation, and will notify counsel at such time as I am ready to make my findings of fact and conclusions of law.
>
> MR. COLVIN: The Court does not desire to rule today?
>
> THE COURT: I have not read all of the exhibits in their entirety and would not rule until I have had time." (S/F 88-89).

Further argument was then heard on the evidence. (S/F 89-91).

The above-quoted exchange, taken with the surrounding circumstances, yields an obvious conclusion. At the close of the testimony, the court felt that the State had not proven venue, and simply found Petitioner not guilty without having to decide whether the evidence showed an offense. This notion is further substantiated by the fact that the court did not rule in the motion to revoke because "he had not read all the exhibits." It would seem logical that if the court hadn't read the evidence when he made his ruling, the court's verdict would not have been based upon evidence as to the criminal acts, if he hadn't read the evidence when he made his ruling. Thus, there never was an adjudication on the operative facts of the case.

committed the offense of theft, but because he committed the offense of defrauding with a worthless check over the value of fifty dollars.

This distinction is evident in the case relied upon by Petitioner, *United States v. Jenkins*, 420 U.S. 358, 43 L.Ed.2d 250, 95 S.Ct. 1006. There, the respondent was indicted and charged with "knowingly refusing and failing to submit to induction into the armed forces of the United States."[2] After a bench trial, the District court "dismissed" the indictment and discharged the respondent. The Government sought to appeal.

[2]§12(a) of the Military Selective Service Act, 62 Stat 622, as amended 50 USC App. SS 462(a).

This Court held that a dismissal of the charge against the respondent precluded the Government from appealing the order of dismissal on the ground that any further adjudication of the case was barred by the Double Jeopardy Clause. This Court so ruled because were the Government to prevail in its appeal, the respondent, upon further adjudication, could then be found guilty of the *same* offense of which he had previously been found not guilty, and sentenced for that *same* offense.

In *Price v. Georgia*, 398 U.S. 823, 825, 26 L.Ed.2d 300, 303, 90 S.Ct. 1757, this Court stated:

> "The 'twice put in jeopardy' language of the Constitution thus relates to a potential, i.e., the risk that an accused for a second time will be convicted of the '*same offense*' for which he was initially tried."
> (Emphasis Added).

In the instant case, as in any probation revocation, the offense which jettisons deprivation of liberty is not that which was alleged in the motion to revoke, but is that offense for which petitioner was placed on probation. Respondent has no quarrel with the principle that the issue of whether Petitioner committed the offense of theft beyond a reasonable doubt is forever precluded in a subsequent proceeding which is a criminal trial for that same offense. However, where the subsequent proceeding is not a criminal trial, but is merely an evidentiary hearing to determine whether Petitioner has violated a condition of probation, and where the proof required in that proceeding does not rise to the level required in a criminal trial, a prior finding that Petitioner did not commit the offense of theft beyond a reasonable doubt does not prevent, by virtue of double jeopardy or collateral estoppel, a potential finding that

he committed that offense by a preponderance of the evidence.

CONCLUSION

A finding of not guilty in a criminal trial for an offense does not preclude its use as the basis for a motion to revoke probation.

WHEREFORE, Respondent prays that the writ of certiorari be denied.

HENRY WADE
Criminal District Attorney
Dallas County, Texas

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

Assistant District Attorney
Dallas County, Texas

JOE B. DIBRELL
Assistant Attorney General
Chief, Enforcement Division

JOHN PIERCE GRIFFIN
Assistant Attorney General

P.O. Box 12548
Capitol Station
Austin, Texas 78711
(512) 475-3281

Attorneys for the Respondent

PROOF OF SERVICE

I, John Pierce Griffin, a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the foregoing Brief in Opposition to Petition for Certiorari has been served on Petitioner by placing same in the United States mail, certified, postage prepaid, addressed as follows: Thomas S. Goggan, III, Esq., 910 American Bank Tower, Austin, Texas 78701, and Oliver Heard, Esq. 1019 Tower Life Building, San Antonio, Texas 78795, on this the 11th day of October, 1977.

JOHN PIERCE GRIFFIN
Assistant Attorney General